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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

PETITION FOR RECONSIDERATION AND CLARIFICATION

OF THE

RURAL TELEPHONE COALITION

July 17, 1997

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SUMMARY

The Commission should reconsider its Report and Order and correct a number of erroneous determinations that are based on serious misinterpretations of the universal service provisions of the Telecommunications Act of 1996, on faulty factual assumptions, or arbitrary conclusions. The decision to limit federal support to 25% of the funding required to meet the interstate definition of universal service is an exercise in arbitrariness. The 25% federal funding cap, the overall cap and the limitation on support for acquired lines all conflict with Section 254's requirement that support be "sufficient,""explicit" and "predictable." The 25% cap conflicts also with prior policy under which existing USF supports high costs over and above the 25% of non- traffic sensitive costs allocated to the interstate jurisdiction. The Commission's unilateral decision usurps the states' authority to participate in separations decisions through a Section 401(c) Joint Board and illegally directs the states to provide support for federal universal services.

The Report and Order distorts Section 214(e) of the Act and Section 254 in other respects. The Commission reads ambiguity into Section 214(e) in order to make support available to purchasers of unbundled elements, despite Congress's directive restricting eligibility in some measure to facilities based carriers. The Commission further misconstrues Section 214(e) by suggesting that states designate as "study areas" the non-contiguous areas of rural telephone companies.

The Commission errs in overlooking the Act's intent of promoting universal service and places undue emphasis at creating competitors. For example, the Commission promotes cream skimming by making support portable and insists on considering competitive bidding as a means

of choosing eligible carriers. Also, even in the absence of suitable models, the Commission insists that support for rural telephone companies will be determined by using forward looking costs. The combined impact of these decisions conflicts with the Commission's definition of competitive neutrality and its stated intent to make competitive neutrality an additional principle upon which its decision is based.

The Commission should correct these errors and other mistakes in its decision. There is a need to clarify the manner in which long term support will be applied during the transition. The definition of "toll limitation" services should be changed because it is technically impossible for local exchange carriers to provide toll control services. Lastly, the Commission should abandon its directive that the USF administrator select a subcontractor. This type of management decision should be left to the administrator.

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The Rural Telephone Coalition ("RTC") requests reconsideration and clarification of the Report and Order (FCC 97-157) ("Order") establishing new support mechanisms to ensure universal service. The RTC is comprised of the National Rural Telecom Association (NRTA), the National Telephone Cooperative Association (NTCA) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO). Together the three associations represent more than 850 small and rural telephone companies.

I. THE ORDER UNLAWFULLY SADDLES THE STATES WITH 75% OF THE COST FOR "SUFFICIENT" NATIONWIDE UNIVERSAL SERVICE SUPPORT.

A. The Order Shirks the FCC's Responsibility for Sufficient Federal Funding .

The Order (¶ 201) holds that the Commission will limit its share of the funding necessary to satisfy the interstate definition of universal service to 25% of the shortfall to be calculated under a yet-to-be-completed high cost standard based on forward-looking proxy costs for universal services and a nationwide revenues benchmark. The 25% interstate support ceiling takes effect in 1999 for non-rural LECs and, for rural LECs, as soon as a proxy model is completed and applied to them.

The Commission rightly recognizes its paramount responsibility, under the 1996 Act, to "ensure that the support for ... [federally-defined] services is 'specific, predictable, and sufficient' " (¶ 816) to "preserv[e] and advanc[e] universal service" (¶ 815) and to "effectuate Section 254" (¶ 814). It is also aware that the states' authority to adopt sufficient support mechanisms is restricted to mechanisms that are consistent with and do not burden the federal mechanisms (¶ 816). However, the Commission's decision to fund only 25% of the federal universal service fund unlawfully shirks that statutory "primary responsibility" for the federal universal service definition and support mechanisms, by mistaking its "responsibility" for funding a "sufficient" federal high cost and low income support mechanism for statutory "authority" to offload 75% of that support responsibility onto state universal service support mechanisms.

In effect, the Commission's adoption of a 25% limit on "interstate" funding amounts to assuming "ultimate responsibility" for only a quarter of its required and acknowledged duty under Section 254. Conspicuously missing from the Order is justification for the leap from recognizing Commission "responsibility" under Section 254 and the current existence of separate federal and state support mechanisms to its assertions that Section 254 has given the Commission authority (a) to "assess contributions for the [federal] universal service support mechanisms . . . from intrastate as well as interstate revenues," (b) "to require carriers to seek authority from states to recover a portion of the contribution [to the "sufficient" federal mechanism] in intrastate rates" (¶¶ 807, 809, 818 and 823) and (c) to restrict the nationwide share on its own initiative if it cannot get state consent to participate in joint recovery (¶¶ 268-74). The Order (¶ 824) states that the Commission is refraining from exercising the full authority it claims for the sake of "comity."

However, adopting (¶ 833) its arbitrary 25% restriction on the federal support share it will collect from a nationwide mechanism that spreads the federal share of high cost support across all states and virtually all customers unlawfully amounts to a federal mandate for state recovery. And by shifting 75% of its responsibility to the states, the Commission has relinquished the ability to ensure or even predict implementation that satisfies the specific mandates Section 254 entrusts to federal responsibility.

B. The 25% Ceiling on Nationwide High Cost and Low Income Support Mechanisms Does Not Ensure "Sufficient" or "Predictable" Federal Support.

The Order purports (¶ 269) to choose 25% as the total federal share of high cost service based on forward looking costs and a nationwide revenues benchmark because (a) 25% is an apportionment factor that is already in use for loop costs and (b) "loop costs will be the predominant cost that varies between high cost and non-high cost areas." But the effort to justify the factor as one already used to identify nationwide, i.e. federal, support rests on a basic misunderstanding of the 25% gross allocation factor for loop costs.

As the Order explains (¶¶ 209-212), the 25% loop cost allocator excludes current interstate Universal Service, which is added to the 25% base by classifying more than 25% of high cost LECs' costs as "interstate" to moderate local and intrastate rates. The 25% also does not include interstate DEM Weighting support.[1] Accordingly, there is no factual or legal basis for the Order's statement (¶ 269) that "this [25%] factor best approximates the interstate portion of universal service costs." Nor does the Commission know the extent of interstate support in access charges, separations and other policies and requirements, also beyond the 25% factor the

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1 The 25% factor is not representative of the high switching costs recovered by DEM Weighting, which NECA estimates at approximately $400 million for 1998..

Order uses as a proxy for interstate universal service support.

Given these facts, cutting the federal share of universal service back to 25% violates the requirement in Section 254(d) and (e) for "sufficient" and "predictable" federal support mechanisms, funded by contributions from all providers of interstate service — not from states or intrastate revenues.[2] To satisfy the intent of Congress, that federal support must include sufficient nationwide support to replace current interstate support when it is made explicit without causing local and intrastate rate increases.[3] The 25% ceiling will prevent this.

C. The Lack of Joint Board Consideration and Recommendation about the Proper Level of Nationwide and Individual State High Cost Support Invalidates the Commission's Summary Separations Change to a 25% Ceiling.

Current federal support flows mainly work through jurisdictional separations decisions that determine whether interstate or intrastate customers will ultimately pay for universal service programs. Even without jurisdiction over intrastate rates, this gives the Commission substantial control over the level of state and local rates. Therefore, Section 410(c) requires separations decisions by a Federal-State Joint Board to involve state representatives in evaluating separations

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[2] The impossibility of predicting or evaluating the sufficiency of federal support before the adoption of the central cost proxy does not indicate that it is "premature" to reconsider the 25% ceiling, as the July 10, 1997 Reconsideration Order claims (¶ 28). Instead, it proves that the adoption of the 25% ceiling was "premature," as well as unlawful. That the Commission might decide in the future to pick up more of today's state-supported high costs, which are also not identified yet, cannot make the inadequate federal mechanism "sufficient" or "predictable."

[3] The 25% cap on nationwide federal support would not even pick up a full 25% of total state and interstate loop support currently provided to keep local rates "just, reasonable and affordable" because the Commission (¶ 202, 271) will not recover intrastate and local high costs now supported by state mechanisms.

changes.[4] The 25% allocation ceiling on nationwide high cost support claimed by the Commission has not been duly adopted in a Section 410 (c) proceeding.

The Commission's 11th hour decision to impose this new 25% ceiling on interstate allocation of universal service costs in 1999 lacked the required Joint Board evaluation. The Commission adopted the 25% nationwide high cost support ceiling in the Order (¶ 824) mostly because the Section 254 Joint Board had not made a unanimous recommendation on assigning state and federal support responsibility.

The Commission made this 25% decision unilaterally and summarily, without referring the post-recommendation proposal properly to the Joint Board, soliciting comments, providing adequate notice to the public and the state members, considering alternative approaches or providing the reasoned explanation and factual basis necessary to change the existing separations rules. Consequently, the ceiling is an unlawful separations change that violates the state protections embodied in Section 410(c) and required by Section 254(a)-(b).

D. The Commission Has No Basis to Assume that the Individual States Will Support 75% of the Federal High Cost Support Mechanisms.

As noted above, the Commission has renounced responsibility for whatever state implicit support is made explicit, unless after monitoring it chooses to increase the federal share.[5] It has not committed itself to pick up more of the tab if state programs are not adequate to recover both

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4 The drafters of Section 254 likely had the role of separations in existing interstate universal service support in mind in requiring federal implementation of the Act's universal service provisions by a Section 410(c) joint board, with an added consumer representative.

5 The Order's assumption that the Act mandates state conversion of all implicit state support to explicit support is incorrect. Section 254(e) attaches the "explicit" goal to federal support; Section 254(f), the state support provision, does not require explicit state support.

75% of federal funding and any Section 254(f) intrastate support the state adopts. It is simply not reasonable to assume that even the most rural, high cost states, with the shallowest pools of lower cost ratepayers over which to spread universal service costs, "will fulfill their role in providing for the high cost support mechanism" (¶ 271).[6]

The Commission's holding that states will cover 75% of the federal support ignores many of the statutory support standards. How can the Commission even speculate that support will be "sufficient" without discussing the nationwide statutory goal of "reasonably comparable" rural and urban rates and services and access to advanced telecommunications and information services (47 U.S.C. sec. 254(b)(3))? In reality, at least some states will not be able to recover 75% of the federal funding needs. In any event, the Supreme Court has recently reminded the federal government that the U. S. Constitution does not permit Congress to enact laws that require states to enforce federal programs.[7] Thus, Congress thus must have found it necessary to state the separate requirement for "sufficient" federal support in Section 254(e) to ensure adequate federal funding collected nationwide, rather than concentrated in the highest cost states.[8]

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6 The primary federal role beyond the 25% portion of the federal funding will apparently be (¶ 272) to evaluate whether the 25% and state support are sufficient "to ensure just, reasonable, and affordable rates."

7 Printz v. U.S., 65 U.S.L.W. 4731 (1997).

8 The terms "federal" and "state" that distinguish the mechanisms in subsections (e) and (f) suggest that Congress had in mind the traditional division between federal and state authority, not a new division between a joint federal and state fund for which the Commission could order state contributions and a second state fund within each state's authority. The FCC retains the longstanding ability ultimately to classify costs as interstate through the Section 410(c) joint board proceeding required for separations changes. It has had no difficulty in the past in using an "expense adjustment" that, in effect, asserts interstate jurisdiction over costs that

II. THE COMMISSION'S INTERIM PROVISION FOR SUPPORT OF LINES ACQUIRED BY SALE VIOLATES SECTION 254 OF THE ACT.

The Commission decides to limit federal universal service support to carriers purchasing exchanges after May 7, 1997 to the same level of support per lines as the seller received prior to the sale.[9] The Commission's sole reason for this interim rule is that the new rule will discourage carriers from placing unreasonable reliance upon potential universal service support until it applies forward-looking economic costs to calculate support for all carriers.[10]

There is no legal record or support for the Commission's explanations or conclusions. There is no historical basis, only mere surmise, upon which the Commission can conclude that companies have based acquisition decisions on the amount of support available for acquired lines. A significant factor justifying the grant of the numerous study area waivers over the last several years has been the readiness (long before passage of the 1996 Act) on the part of the acquiring LEC to meet the "comparability" requirements now in 1996 Act. In light of this history, there is no justification for the Commission to discourage acquisitions by small LECs that have improved service consistent with national universal service goals. It is particularly

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would otherwise have fallen under the intrastate jurisdiction through the general jurisdictional separations rules. 47 C.F.R. Section 36.361. It has exercised that authority to modify jurisdictional separations in implementing Section 254, although the statute does specify that the mandatory implementation joint board must be convened pursuant to Section 410(c). It would also be consistent with past separations and universal service precedents for the Commission to look at total carrier revenues, not just interstate revenues, in allocating the duty to contribute to federal funding among interstate providers. That approach comports with its current use of the "expense adjustment" based on total, unseparated loop costs to shift additional high costs to the interstate jurisdiction for nationwide recovery through the USF.

9 *Order* ¶ 308.

10 Id.

ironic that the Commission wants to prevent rural LECs from gambling on the prospect of receiving support, but wants to award new entrants with support based on the ILEC's cost, a clear invitation to USF shopping.

III. THE COMMISSION'S CALCULATION OF PORTABLE SUPPORT INVITES CREAM SKIMMING.

The Commission's decision to "calculate an ILEC's per-line support by dividing the ILEC's universal service support payment by the number of loops in the ILEC's most recent annual loop count" (¶ 312) ignores demonstrated rural dynamics and cost structures, while inviting cream skimming. The Commission recognizes this fact when it states "[o]ver time, it will be necessary to adjust the universal service support mechanism to respond to competitive pressures. . . ." For a rural ILEC that is facing competition, the time is now to adjust the portable universal service support mechanism.

The RTC and many other rural commenters have consistently demonstrated the extreme differences in cost between a nearby customer in town 100 yards from the central office and a farm twenty miles out. If a competitor targets[11] the lower cost customer in the town (the likely and rational competitive outcome), it will receive more support than is necessary to serve that customer due to the use of the incumbent's averaged cost. This, of course, gives the competitor an unfair advantage since it will be able to use this windfall of unnecessary support to undercut

[11] Although a CLEC is required to serve the entire ILEC study area in order to receive funding (47 U.S.C. Section 214(e)(1), see also, Section 253(f)), the CLEC is more likely to concentrate facilities in the profitable town areas and serve the outlying areas through resale as an afterthought. CLECs can effectively be selective in the customers they accept through their rate structure, and marketing methods. For example, a CLEC can avoid serving high-cost, outlying customers by advertising a higher rate than the ILEC.

the incumbent. The Commission must fully consider the perverse results of using ILECs' average costs during the transition period and the contorted economic incentive to creamskim that such a support mechanism sends to competitors.

An additional concern is the portability of long term support (LTS). LTS, by its very nature, should not be portable. LTS was created in 1989 to support small companies that remained in the NECA pool. The large companies that left the pool agreed to provide the funding to keep CCL rates for the remaining companies at a rational level. LTS is less of a high cost recovery mechanism than a ratemaking mechanism. New competitors are not members of the pool and, therefore, are not in need of any long term support. LTS should be reserved for the original pool members.

IV. THE COMMISSION SHOULD RECONSIDER AND/OR CLARIFY ITS DECISION TO USE A FORWARD-LOOKING ECONOMIC COST METHODOLOGY.

A. The Commission's Cost Methodology is Not Yet Developed Nor Clearly Defined, and Therefore Cannot Meet the Act's Requirements for Sufficiency and Predictability.

The Commission should reconsider its premature mandate for a universal service mechanism based on a cost methodology that has not yet been clearly developed nor defined. Adopting a mechanism based upon a cost methodology which remains undeveloped and the subject of many future proceedings[12] cannot possibly meet the Act's requirements for a universal service support mechanism that is both *predictable* and *sufficient*.[13] In addition, the Commission fails to answer questions raised in the comments concerning basic details of the proposed

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12 *Order* ¶¶ 248-249, 252.

13 47 U.S.C. Section 254(b)(5).

economic cost methodology. For example, no information has yet been given regarding scheduled updates to the proposed economic cost studies.[14]

B. A Cost Methodology Based on a Hypothetical, New Network Will Produce Legacy Costs That Must be Recovered.

The Commission's Order also fails to resolve the concerns previously raised by the RTC regarding the LECs' ability to recover embedded costs.[15] The record is replete with comments pointing out that LECs will suffer a loss due to legacy costs at a level that depends on the specifics of the proposed methodology.[16] Dr. Alfred Kahn has explained the cost recovery consequences that LECs will face if the FCC adopts a forward-looking cost methodology based on a hypothetical, completely new network, rather than the LECs' actual network. According to Dr. Kahn, forward-looking economic costs send the correct signals to competitors only if those "pricing signals" inform consumers of the costs that society will *actually* incur. "These can only be the actual incremental costs of the incumbent companies."[17]

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14 *See* RTC Letter to Accounting and Audits Division Deputy Chief John Morabito, CC Docket No. 96-45, January 7, 1997.

15 *Order* ¶ 230, See RTC Comments at 2-3, December 19, 1996. *See also*, RTC Reply Comments at 1-2, January 10, 1997.

16 *See* Affidavit of Robert Crandall, CC Docket 95-45, December 19, 1996, Alexander Larson, "A Price is Not a Formula," *Public Utilities Fortnightly*, September 1, 1996.

17 *See* Alfred Kahn's Letter to Reed Hundt at 1, January 14, 1997. Kahn also made this point: In a world of continuous technological progress, it would be irrational for firms constantly to update their facilities in order completely to incorporate today's lowest-cost technology, as though starting from scratch: investments made today, totally embodying today's most modern technology, would instantaneously be outdated tomorrow and, in consequence, never earn a return sufficient to justify the investments in the first place. Id. at 2.

The RTC specifically requests that the Commission clarify, at the very least, that any forward-looking cost methodology it intends to develop as a basis for the universal service support mechanism will not entail the use of the forward-looking incremental costs the Commission believes the LEC *should* incur if it started each day from a "blank technological slate" instead of those forward-looking costs the LEC *will actually* incur. Competitive market prices tend to be based on the actual costs of the incumbent carriers.

C. Mandating That Rurals Must Transition to a System Based on Forward-Looking Cost is Not Consistent With the Commission's Acknowledgment That No Appropriate, Accurate, and Verifiable Cost Model Has Been Developed.

The *Report and Order* establishes a transition mechanism by which rural telephone companies are expected to eventually move to a system based on the Commission's yet-to-be-developed cost methodology.[18] The Commission anticipates "that forward-looking support mechanisms that could be used for rural carriers within the continental United States will be developed within three years of release of the Order."[19] The RTC believes that the Commission should reconsider its decision in this Order to mandate that rural telephone companies transition at *any* time to this undetermined methodology, since there is absolutely no assurance that a verifiable model[20] can be developed by which to determine correctly appropriate forward-looking costs, defined in a correct manner.

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18 This transition is not to be completed before the year 2001. *Report and Order* ¶ 204.

19 Id. ¶ 293.

20 Verifiability is one of the criteria adopted by the Commission to be used in judging the applicability of any cost proxy model to estimate incremental costs. *Report and Order* ¶ 250.

As explained in the RTC's comments following the Joint Board's proxy workshops, a few days of panel discussions are an inadequate method by which to ensure the development of an appropriate, verifiable model by which to determine forward-looking costs.[21] Rather, several additional questions and concerns were raised during this process (*e.g.*, the models' inability to account for changes to a carrier's market share). None of the ongoing problems with the models were solved.[22]

The RTC also requests reconsideration of the Commission's selection of the criterion that the rate-of-return for state elected cost studies be either the authorized federal rate-of-return, currently 11.25 percent, or the state's own presubscribed rate-of-return for intrastate services.[23] The FCC is charged with the task of developing a predictable and sufficient *federal* support fund. The federal rate-of-return must be used in the determination of costs for the *federal* universal service support fund. States' prescribed rates-of-return vary widely. They cannot justifiably be used for the federal cost study, nor should they be allowed to replace the Commission-prescribed return.

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21 On January 14-15, 1997, the staff of the Federal-State Joint Board on universal service conducted workshops relating to the selection of a proxy model for determining the cost of providing services supported by the universal service support mechanism.

22 *See*, generally, Comments of the RTC and GVNW-Management, Inc., January 24, 1997.

23 Order ¶ 250.

V. THE COMMISSION CANNOT LAWFULLY REQUIRE STATES TO CONSIDER UNBUNDLED NETWORK ELEMENTS A CARRIER'S " OWN FACILITIES" ELIGIBLE FOR HIGH COST SUPPORT UNDER SECTION 214(e)

The Commission should reconsider and abandon its decision to support unbundled network elements as if they were the same as facilities-based competition. The interpretation conflicts with the plain language of Section 214 (e)(1)(A), undermines the intent of Congress to prevent subsidized cream skimming in high cost rural LEC service areas and usurps each state's exclusive authority to designate carriers eligible for high cost support.

Section 214(e)(1)(A) requires that a carrier seeking the state designation as an "eligible telecommunications carrier" (ETC) necessary to obtain federal high cost support must offer the federally-defined universal services throughout the state-defined "service area" for which it seeks support "using its own facilities or a combination of its own facilities and resale of another carrier's services." Unlike Section 251(c)(2)-(4), which identifies three kinds of ILEC obligations for connecting or opening their networks for use by competitors -- facilities interconnection, unbundled network elements and discounted resale Section 214 distinguishes <u>two</u> CLEC competitive entry strategies — "own"(or hybrid) facilities-based entry and entry by resale. Congress did not define or alter common usage for the adjective "own," the noun "facilities" or the phrase "its own facilities" or provide that "access to network elements" obtained "on an unbundled basis" from an underlying facilities-based ILEC pursuant to Section 251(c)(3) should qualify for universal service support. Nevertheless, the Commission has ordered states to accept "[unbundled] access to network elements" (UNE's) under Section 251 as "own facilities" in Section 214 (e)(1)(A). This illogical reading of the "own facilities" requirement, in effect, unlawfully rewrites Section 214(e) into a pro-competitor — rather than a pro-universal service or even pro-competition — mandate.

The Order admits (¶¶ 151-53) that the Commission deliberately construed "facilities" to provide support for a competitor using an incumbent's network, even minimally, by UNEs , more to facilitate entry than to safeguard universal service, though it characterizes the purpose as "competitive neutrality." Knowing Congress could have meant resale to include UNEs (¶ 155), the Commission treated the two variations on non-facilities based entry, both wholly dependent on the underlying ILEC's physical network, disparately, thereby unlawfully treating similarly-situated carrier groups differently to benefit one type of access transaction.[24] Despite the trivial difference in the "risk" undertaken by a CLEC reselling services compared to a CLEC using UNEs (Interconnection, 11 FCC Rcd 15499, ¶ 334), there is much more difference in risk between the underlying facilities provider (the ILEC) and both resale- and UNE-based entry. As a result, the Commission discriminated against both resellers of services and genuine facilities-based carriers and provided an uneconomic incentive for CLECs to select the UNE entry mode. Deterring genuinely competitive facilities-based entry this way frustrates the statutory goal of infrastructure and technology advances -- a basic goal endorsed in the Conference Report (p. 113) -- by emphasizing "pro-competitive" goals to the exclusion of Congress's other fundamental purposes. The pro-UNE bias will also dampen incumbent LECs' incentives to increase investment in rural facilities to avoid having to provide them to competitors at below-actual-cost prices under the Commission's local competition rules.

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[24] Treating UNE users as if they had deployed true facilities-based networks like ILECs also fails to distinguish between carriers that are not similarly situated, another form of unjustified discrimination.

The Commission also distorts the plain meaning of "its own facilities." Despite correctly declining (¶ 152) to adopt an even broader reading of "facilities," lest its construction "render meaningless the facilities requirement of Section 214(e)" by letting resellers qualify as ETCs, the Commission does exactly the same thing by reading UNEs as the purchaser's "own" facilities. The Order (¶ 156 et seq.) wrongly claims that the statute is "ambiguous" to offer a flimsy excuse for substituting the Commission's theory that Congress must have intended to extend ETC status to, in essence, another resale payment option for using the ILEC's network. The conclusion that Congress could not have meant to subsidize only genuine facilities-based entry "given" its supposed (unexpressed) "intent" to treat all Section 251 entry methods alike (¶ 163), is manifestly in error: Congress explicitly enacted a no-support approach for resale, one of the three supposedly equal Section 251(c) entry strategies, but expressly allowed eligibility for another "equal" entry mode, interconnection of physical facilities pursuant to Section 251 (c)(2) — in the very section where the Commission sees a parity mandate for all three.

That only a carrier's "own facilities," in the traditional sense of the phrase, can qualify for high cost support comports with common usage and the common sense understanding of the adjective "own": "belonging to oneself or itself – usu. used following a possessive case or pronoun <cooked his ~ dinner>" [25] or "belonging, relating, or peculiar to oneself or itself, used to strengthen a preceding possessive [his *own* book, her *own* book]." [26] There is no point in the Order's attempt to construe the (adjectival) phrase "own facilities" by discussing the verb "to

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[25] Webster's Ninth New Collegiate Dictionary (1987). Here, the possessive phrase is "its own."

[26] Webster's New World Dictionary, Second College Edition (1982).

own" or its derivative, "owned by" a carrier, since neither corresponds to Act's actual words and grammar. Indeed, the Commission itself has expressed the distinction between the underlying facilities provider and a carrier taking unbundled elements under Section 251 as the RTC does[27] and has not explained why it now reads a different meaning in the same unambiguous phrase in Section 214(e).

Deep concern that market forces will neglect rural needs, raise rural prices and retard rural infrastructure modernization permeates the universal service principles, such as rural and urban rate and service comparability, geographically averaged interexchange rates, rural access to advanced telecommunications and information services, nationwide affordable rates and an evolving definition of federally-supported universal services. Congress even reserved state authority to limit rural competitors to area-wide entry in Section 253(f), except when exemption or modification of Section 251(c)(4) effectively prevents CLEC entry by resale (but, significantly, not when exemptions or modifications preclude entry via UNEs). This safeguard demonstrates the legislators' fear that the "benefits" of competition in rural markets may otherwise flow to a few large customers to the detriment of the rest of the rural customers.[28]

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[27] For example, in the Local Competition Order (¶ 362) the Commission said the "primary purpose of Section 251(g) is to preserve the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by means of unbundled elements purchased from an incumbent." Again in that case (¶ 386), the Commission specified that "an incumbent LEC must take the steps necessary to allow a competitor to combine its own facilities with the incumbent LEC's unbundled network elements."

[28] The Order echoes (¶ 940) the Commission's customary reassurance that non-price cap LECs are (or at least can be) spared from adverse consequences by exemptions, modifications or suspensions of the unbundled element requirement. The reassurance rings hollow, given the Commission's continuing commitment before the Eighth Circuit to obstacles it erected to the rural telephone company relief under Section 251(f)(1) and (2).

The Commission should, on reconsideration, return to the typical meaning and its own customary use of the phrase "own facilities" to avoid subsidized cream skimming in rural study areas where a competitor has not shown any real investment or commitment by providing its "own" physical facilities, at least in part.[29] It would also comply with the Section 254(e) mandate that all interstate service providers shoulder a nondiscriminatory share of federal support.[30]

That way, rural customers would not be denied beneficial competitive service that can be provided at lower cost from facilities elsewhere, but the mechanism would channel high cost support only to facilities, services and providers that actually incur the higher cost of serving a rural study area, and neither interstate nor local ratepayers would have to pay superfluous support. Moreover, eliminating the Order's multiple interpretations that mandate support for

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29 The Commission should also discard two other unlawful interpretations of Section 214 in the Order because Section 214(e)(1)(A) requires an ETC to "offer the services [plural] that are supported by Federal universal service support mechanisms under Section 254(c)"-- not "one" or "a couple" of the supported services — "either using its own facilities or a combination of its own facilities and resale of another carrier's service" and "throughout the service area for which designation is received": (1) This plain language rules out support for a competitor by resale that offers one or a few of the services by UNEs; and (2) It also precludes support for a competitor offering universal services in a rural study area using UNEs outside the high cost study area, to prevent a windfall for up to 100% of the cost of UNE facilities outside the high cost rural environment that high cost support targets. Otherwise, the Order's unwarranted liberality with unneeded or unjustified support will wrongly burden the customers who ultimately pay for carriers' universal service contributions and violate the ban on using federal support for any but the facilities or services for which the support is intended.

30 The Order also inaccurately claims (¶¶ 160-167) that UNE users pay the ILECs' full, competitively neutral cost of network elements under Sections 251 and 252. The Order itself precludes this result (¶¶ 851 and 287), by both (a) exempting UNE users from the competitively neutral requirement to flow through a fair share of carrier contributions for universal service costs and (b) allowing a UNE user's support to cover up to the full charge paid for UNEs as universal service support.

UNE users would honor the states' exclusive authority over designation of ETCs under the Act.[31]

VI. THE CONTINUED IMPOSITION OF A CAP ON THE USF IS UNLAWFUL UNDER THE ACT.

The existing indexed cap was initiated January 1, 1994 and was only to have been in place for two years pending adoption of permanent changes to the universal service fund. However, the Commission would now extend it indefinitely until forward-looking economic cost mechanisms are developed and put in place, a process that will not be completed until at least January 1, 2001. This means that an "interim" cap will have been in place for at least seven years.

The cap is an arbitrary rule which disproportionately excludes from the fund increases due to new high cost loops. Thus, if the average cost of new lines exceeds the previous year's embedded cost per line, it will be disallowed. If the average cost per loop is increasing, for entirely legitimate reasons, the cap will exclude support for reasonable costs incurred in the high cost areas, denying support where and when it is needed most. The adoption of a transition plan for rural telephone companies does not justify continued application of the cap. The Commission is required to heed the Act's requirement of "sufficient" support during this interim period when it decides on particular methodologies to accomplish its goals. As the Eighth Circuit recently stated, "The Act requires the reform of universal service subsidies and not,

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[31] The Conference Committee (see Report at 139-42) deleted the division of designation jurisdiction between the federal and state commissions from the Senate bill, which had originated the designation provision. The Eighth Circuit recently struck down a Commission rule that "allowed" temporary state access charges as "an assertion of regulatory power . . . beyond the scope of the FCC's jurisdiction." Comptel, slip op. at n.5.

significantly, abolishment of universal service, even temporarily.[Emphasis added.] [32]

The Commission claims the cap will prevent excessive growth in the size of the fund,[33] but fails, however, to answer a number of important questions: What is excessive growth? How is recognizing actual cost excessive growth? The Commission must provide more than speculation to justify the cap. It has not done so. The Commission also concludes that a cap will encourage carriers to operate more efficiently by limiting the amount of support they receive.[34] However, this ignores the fact that reducing funds available to install appropriate equipment will mean lower quality. It also means that companies will be reluctant to install certain types of lines if these installations increase the average cost per line.

Lastly, the Commission concludes that excessive growth in high loop cost support would make the change to forward looking support mechanisms more difficult for rural carriers if those support mechanisms provide significantly different levels of support. Carriers should not be subject to the cap on the mere assumption that the ultimate outcome of this proceeding will lead to a forward looking cost methodology that reduces support but still complies with the statute's "sufficient" and "predictable" requirement.

Even if the Commission does not eliminate the cap it should adjust the size of the cap to reflect the addition of new providers and/or new service areas not counted the previous year. At a minimum, the count of working loops should incorporate all local service providers including

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32 Competitive Telecomms. Ass'n, et al., v. FCC, No. 96-3604, 1997 U.S. App. LEXIS 15398, *14 (8th Cir. June 27, 1997).

33 ¶ 282.

34 Id.

competitive local exchange carrier loops and associated loop costs. This would at least avoid additional distortions in the universal service fund which would result from new carriers and new areas. All year to year changes such as the addition of DEM weighting, LTS or addition of new eligible LECs such as Guam should be reflected in the growth allowed in the fund each year.

VII. THE COMMISSION SHOULD REEXAMINE ITS INTERPRETATION OF SECTION 214(E)(5).

The Commission concludes that the Joint Board was correct to assume that competitors will target only the customers that are the least expensive to serve unless the Commission retains rural telephone study areas as "service areas."[35] Despite this conclusion, the Commission then undermines Section 214(e)(5) by encouraging the states to designate areas smaller than "study areas" where the rural telephone company study area is noncontiguous. It does so to benefit wireless carriers, because "they might not be able to provide service throughout a rural telephone company's study area. . . ." [36] The Commission, thereby, encourages the very cream skimming that Section 214 is intended to address. In fact, the threat may be worse in study areas made up of noncontiguous territory. The essential point of Section 214(e) is that the quid pro quo of designation as an eligible carrier is the agreement and obligation to offer supported services throughout the service area.

VIII. THE COMMISSION SHOULD CLARIFY THE MANNER IN WHICH LTS RULES WILL BE APPLIED DURING THE TRANSITION.

The new LTS mechanism needs to be clarified. The old mechanism calculated the size of LTS for the common line pool and made payments from the "pooled" common line revenue

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35 *Order* ¶ 189.

36 Id.